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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1287.~~ 855 — (886 William

SCHMIDT BROTHERS, A FIRM COMPOSED OF ALBERT SCHMIDT AND TITUS SCHMIDT, APPELLANTS,

vs.

E. M. COBB.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED MARCH 11, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Petition in Equity.*

In the District Court of Dubuque County, Iowa. September Term, A. D. 1884.

E. M. COBB *vs.* SCHMIDT BROTHERS.

The plaintiff, agent of the Citizens' Law and Order League of Dubuque, complaining, shows to the court and avers as follows:

Par. 1st. That he is a citizen of Dubuque county, State of Iowa.

Par. 2d. That defendants, Schmidt Brothers, a firm composed of Albert Schmidt and Titus Schmidt, at the city and county of Dubuque, at the Iowa Brewery so called, situated upon Couler avenue, in said city, and upon lot number 5 in Brewery addition, as platted and recorded with Dubuque deeds, have established a saloon and place for the keeping and sale of intoxicating liquors, to wit, whiskey, wine, gin, and beer, in violation of law, and are now keeping, and employed and engaged in keeping, said intoxicating liquors in said saloon and place with the intent to sell the same, and with the intent to permit the same to be sold therein, contrary to the provisions of section 1542 of the Code of Iowa as amended and substituted by an act of the General Assembly of the State of Iowa, approved April 3rd, 1884.

Par. 3rd. That in the month of August, 1884, the said defendants, in the saloon and place aforesaid, did, by themselves, their clerk, agent, and servant, sell to divers and sundry persons intoxicating liquors, to wit, whiskey, wine, gin, and beer, contrary to the provisions of section 1540 of the Code of Iowa as amended and substituted by an act of the General Assembly of the State of Iowa, approved April 3rd, 1884.

Par. 4th. That said defendants, at the saloon and place aforesaid, have heretofore, to wit, since the 15th day of July, 1884, by themselves, their clerk, agent, and servant, sold, and continue from day to day to sell, intoxicating liquors, to wit, whiskey, wine, gin, and beer, as a beverage, contrary to law.

Par. 5th. That said defendants are the owners of the premises aforesaid, and are the owners of certain whiskey, gin, wine, and beer kept and contained in certain kegs, bottles, and other vessels for illegal sale upon said premises as aforesaid, and are the owners of certain furniture and fixtures on the said premises used in said business.

Par. 6th. Whereby and by reason of the premises and in manner and form as aforesaid the said defendants, Schmidt Bros., at the saloon and place aforesaid have established and are now keeping and maintaining a nuisance, to the great injury of the plaintiff and other good citizens of said county, and to the detriment of the public peace and safety, and unless restrained by the order and decree of this court will continue to keep and maintain said nuisance at said place in violation of law and to the public injury. Wherefore plaintiff prays that said saloon and place be adjudged and decreed to be a nuisance, and that the same be abated, and said defendants be enjoined by preliminary injunction from further keeping or main-

taining said saloon and place for the illegal sale of intoxicating liquors, and also from keeping the said liquors with intent to sell the same contrary to law, and also from selling the same in said place contrary to law either by themselves or their clerk, agent, or servant, and that upon final hearing said injunction be made perpetual, and that plaintiff have such other and further relief as in equity he is entitled to, and also that he have judgment for costs.

S. P. ADAMS &
JED. LAKE.

STATE OF IOWA, }
Dubuque County, } *ss:*

I, E. M. Cobb, being first duly sworn, depose and say that I am plaintiff in the foregoing petition; that I have heard the same read and know the contents thereof, and that the several averments therein contained are true, as I verily believe.

E. M. COBB.

Subscribed and sworn to by the above-named E. M. Cobb this 1st day of September, 1884, before me.

[L. S.]

S. P. ADAMS,
Notary Public, Dubuque County, Iowa.

Endorsed: Filed Sep. 4, 1884. J. J. Dunn, clerk.

2 *Original Notice.*

To Schmidt Brothers:

You are hereby notified that on the fourth day of September, A. D. 1884, there will be on file in the clerk's office of the — court of the State of Iowa, in and for Dubuque county, the petition in equity of ——, agent of the Law and Order League of Dubuque, charging that at your place of business, at the Iowa Brewery, on Couler avenue, in the city of Dubuque, you have established and are maintaining a saloon and place for keeping of intoxicating liquors with intent to sell the same contrary to law, and that in the month of August, 1884, at said saloon and place, you did, by yourself, your clerk, agent, and servant, sell to sundry persons intoxicating liquors in violation of law, and asking that said saloon and place be adjudged and decreed to be a nuisance and that the same be abated, and that you be restrained, by a writ of injunction, from further selling or keeping for sale intoxicating liquors at said place in violation of law, and that unless you appear thereto and defend before noon of the second day of the next term of said court—that is to say, before noon of the 16th day of September, A. D. 1884—default will be entered against you and judgment and decree rendered thereon, according to the prayer of said petition.

S. P. ADAMS & JED LAKE,
Attorneys for Plaintiff.

3 STATE OF IOWA, } ss:
Dubuque Co., }

I do hereby certify and return that I received the within notice on the 4th day of September, A. D. 1884; that on the same day I personally served the same on the within-named Schmidt Bros. by reading the same to Albert Schmidt, a member of said firm, and giving to him a copy thereof, in Julien township, Dubuque county, Iowa.

JAMES McCANN, *Sheriff*,
By D. A. GEHRIG, *Dep'y.*

Sheriff's fees, 80 cts.

4 *Petition for Removal to United States Circuit Court.*

STATE OF IOWA, *Dubuque County:*

In District Court. September Term, A. D. 1885.

E. M. COBB *vs.* SCHMIDT BROS.

To the said district court:

1st. Your petitioner, the above-named defendant, shows to the court that he is, and for five years last past has been, a citizen of the State of Iowa.

2d. That long prior to and ever since the fourth day of July, A. D. 1884, he was continuously engaged upon the premises mentioned in plaintiff's petition, in the business of keeping a saloon, under and in accordance with the laws of Iowa.

3d. That in the commencement and prosecution of said business he had and has involved property of great value, which will be rendered entirely worthless if the plaintiff succeeds against him in the present action, & being over 20 dollars in value.

4th. That there has been no trial or final hearing of this cause.

5th. That the twentieth General Assembly of the State of Iowa passed an enactment which petitioner prays may be considered in this case, which by its terms went into effect on the 4th day of July, A. D. 1884, being chapters 8 & 143, laws of the 20th General Assembly of the State of Iowa, amending & repealing sections of title XI, chap. 6, Code of Iowa, relating to the sale of intoxicating liquors, which renders highly penal the prosecution of said saloon business, and which, if enforced, as threatened, as hereinafter stated, will destroy the property of defendant so used and deprive him unlawfully of said occupation.

6th. That under the provisions of said law defendant can be deprived of his property and punished with heavy penalties for being engaged in said saloon business without having the opportunity and right of a jury trial upon the questions involved, and without any trial whatever, except as pointed out by said act.

7th. That the supreme court of the State of Iowa, at March term, 1885, in case of Littleton *vs.* Fritz, has declared said law in full force, and the persons in the situation of defendant can be prosecuted

under it and be deprived of property and liberty without any right to a jury trial.

8th. That under said enactment and said decision the said plaintiff has begun and is prosecuting this suit.

9th. That by said proceedings under said enactment and said decision said defendant is deprived of the rights guaranteed him under the acts of Congress usually known as the "Civil Rights" law, and under the Constitution of the United States and amendments thereto especially is he denied, and he cannot enforce in the State judicial tribunals of Iowa, the rights secured to him under said "Civil Rights" law and said Constitution of the United States, and especially the 14th Amendment thereto, and said enactment of said 20th General Assembly and said decision are in violation of said "Civil Rights" law.

Therefore defendant offers, as provided by law, to file copies of all pleadings and proceedings herein in the circuit court of the United Staies for the northern district of Iowa on the first day of its next term, and prays that this suit may be removed into said court, as provided by section 641 of the Revised Statutes of the United States.

FOUKE & LYON,
McCENEY & O'DONNELL,
Attorneys for Petitioner.

STATE OF IOWA, *Dubuque County,* } ss:

Albert Schmidt, being duly sworn, says he is a member of the firm of Schmidt Bros., which is the defendant in this action; that he has heard the foregoing petition read and knows its contents, and that the matters and things therein stated are true, as he verily believes.

ALBERT SCHMIDT.

Signed and sworn to before me this 26 day of August, A. D. 1885, by A. Schmid, the affiant.

Witness my hand and notarial seal.

[SEAL.]

C. E. LYON,
Notary Public.

Endorsed: Filed Aug. 29, 1885. J. J. Dunn, clerk.

5 In District Court, Dubuque County, Iowa. At Chambers.

E. M. COBB
vs.
SCHMEDT BROS. } 6778.

Upon reading the petition and application for temporary writ of injunction in said cause it is ordered that said application be heard on Tuesday, the 1st day of September, A. D. 1885, at 10 o'clock a. m., at the court-house in the city and county of Dubuque, Iowa, or as soon thereafter as counsel can be heard, and that at such time and place defendant show cause why such temporary writ of injunction

should not issue as prayed, ten days' notice of time and place of hearing to be served on defendant, together with copy of affidavit and of said petition, unless copy of said petition has been filed in court.

C. F. COUCH,
Judge of District Court, 9th Judicial District of Iowa.

Endorsed: Order. Filed Aug. 19, 1885. J. J. Dunn, clerk.

6 THE STATE OF IOWA, } ss:
Dubuque County, }

In the District Court.

E. M. COBB *vs.* SCHMEDT BROS.

To the above-named defendant:

You are hereby notified that in the above-named action now pending in said court, in which plaintiff, in his petition, prays that you be enjoined from further keeping or maintaining a saloon and place for the illegal sale of intoxicating liquors, and also from selling or keeping with intent to sell intoxicating liquors contrary to law, either by yourself, your clerk, agent, or servant, at your place of business, the application for an order for a preliminary injunction prayed for in said petition will come on for hearing before Hon. Carl F. Couch, judge of said court, at the court-house in Dubuque, on the 1st day of September, 1885, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, when and where you may appear and show cause against said application if you think proper, said application being based upon said petition and the affidavits, copies of which are hereto annexed.

S. P. ADAMS & JED LAKE,
Attorneys for Plaintiff.

7 STATE OF IOWA, } ss:
Dubuque County, }

I hereby certify and return that I received the within notice on the 19th day of August, A. D. 1885; that on the 21st day of August, A. D. 1885, I personally served the same on the within-named Schmid Bros. & Co. by reading the same to E. Reh, a member of said firm, and giving to him a true copy thereof in Julien township, Dubuque county, Iowa.

JAMES McCANN,
Sheriff, Dubuque Co.,
By D. A. GEHRIG, *Deputy.*

8 STATE OF IOWA, *Dubuque County:*

In District Court, Dubuque County, Iowa.

E. M. COBB *vs.* SCHMIDT BROS.

I, C. E. Bradley, of lawful age, depose and say that I have lived in the city of Dubuque about 25 years; that I know the saloon kept

by defendant upon Couler avenue known as the Dubuque Brewery; that I was in said saloon on or about the 24th day of August, 1884, and whilst there the oldest of said defendants sold me a glass of beer, he being behind the bar at the time dealing out beer, and while in there I saw him sell a glass of beer to another person, which glass of beer was drawn by said Schmidt from the same keg as was the one sold to me; that on or about the 12th day of April, 1885, I was in said saloon and bought a glass of beer of the bartender of said defendants, and drank it, and the same bartender, at the same time and place, sold a glass of beer to five others in my presence, which beer was drawn from the same keg that mine was. A large crowd of strangers were in said saloon at the time drinking beer, which they obtained at that bar.

C. E. BRADLEY.

9 Subscribed and sworn to by the within named C. E. Bradley this 18 day of April, 1885, before me.

[SEAL.] S. P. ADAMS,
Notary Public, Dubuque County, Iowa.

STATE OF IOWA, *Dubuque County,* } ss:

In District Court, Dubuque County, Iowa.

E. M. COBB *vs.* SCHMIDT BROTHERS.

I, Louis La France, of lawful age, being first duly sworn, depose and say that I know the saloon kept by defendants at the Iowa Brewery, so called, on Couler avenue, Dubuque, Iowa, at number 5, in Brewery addition; that I was in said saloon on or about the 24th day of August, 1884, when, in the said saloon, the oldest of said defendants, who was at the time tending the bar, sold me a glass of beer, and at the same time and place he sold beer to another man who was there; several persons were at the bar drinking at the same time.

LOUIS LA FRANCE.

Subscribed and sworn to by the above-named Louis La France this 18th day of April, 1885, before me.

[SEAL.] S. P. ADAMS,
Notary Public, Dubuque County, Iowa.

10 STATE OF IOWA, *Dubuque County,* } ss:

In District Court, Dubuque County, Iowa.

E. M. COBB *vs.* SCHMIDT BROS.

I, C. W. Abetz, of lawful age, depose and say that I know the saloon of defendants, Schmidt Brothers, on Couler avenue, Dubuque, Iowa, known as the Iowa Brewery; that on or about the 12th day of April, 1885, I was in said saloon, and the bartender of defendants,

at that time and place, sold me a glass of beer, and at the same time and place saw said bartender sell beer to four other persons, which beer was all drawn from the same keg, in my presence.

CH. W. ABETZ.

Subscribed and sworn to by the above-named Ch. W. Abetz this 23rd day of April, 1885, before me.

[SEAL.]

S. P. ADAMS,
Notary Public, Dubuque County, Iowa.

Motion.

In District Court. September Term, A. D. 1884.

STATE OF IOWA, *Dubuque County,* } ss:

E. M. COBB *vs.* SCHMIDT BROTHERS.

11 And now comes the defendants, and moves the court to compel the plaintiff to elect which of defendants he will proceed against in this action and to dismiss said action—

1st. Because said action is against a partnership.

2nd. The plaintiff cannot maintain his action for a nuisance against a partnership.

FOUKE & LYON,
E. McCENEY,
For Def'ts.

Endorsed: E. M. Cobb *vs.* Schmidt Bros. Motion filed Sept'r 18, 1884. J. J. Dunn, clerk.

Demurrer.

STATE OF IOWA, *Dubuque County,* } ss:

In District Court. September Term, 1884.

E. M. COBB *vs.* SCHMIDT BROS.

And now comes the defendant and demurs to the petition of plaintiff herein, and for cause of demurrer states—

I.

The petition shows that plaintiff has no legal capacity to sue.

II.

The petition shows no such interest in the plaintiff, in the event of the suit, as will enable him to maintain this action.

III.

12 The petition nowhere alleges that said defendant has been, by a proper tribunal, convicted of the alleged nuisance sought to be enjoined.

IV.

The petition shows that this court has no jurisdiction of the cause of action set out in the petition.

V.

The court has no jurisdiction of this action, because it is an attempt, in a court of chancery, to pass upon the guilt or innocence of the defendant under a penal and criminal statute, and it is by said action sought to deprive him of a jury trial upon the issue raised.

VI.

The section of the statute under which this action is brought is unconstitutional, null, and void, because it is an attempt to deprive the party accused of the offense herein of a jury trial.

VII.

The facts stated in the petition do not entitle the plaintiff to the relief demanded.

FOUKE & LYON,
E. McCENEY,
For Defendant.

Endorsed: E. M. Cobb *vs.* Schmidt Bros. Demurrer filed Sep. 24, 1884. J. J. Dunn, clerk.

13

E. M. COBB
vs.
SCHMIDT BROS. } 6778. Ch'y.

In District Court, Dubuque County, Iowa.

TUESDAY, *September* 16, A. D. 1884.

In this cause McCeney & O'Donnell and Fouke & Lyon appear for defendants.

E. M. COBB
vs.
SCHMIDT BROS. } 6778. Ch'y.

WEDNESDAY, *September* 24, 1884.

In this cause the defendants withdrew their motion.

E. M. COBB
vs.
SCHMIDT BROS. } 6778.

Chancery removed to U. S. circuit court.

MONDAY, *September* 21, A. D. 1885.

This cause now coming on to be heard upon petition by defendants for removal to the Federal court, and the same being submitted, is by the court granted. It is therefore considered and adjudged by

the court that this cause be, and the same is hereby, removed to the circuit court of the United States, northern district, eastern division of Iowa.

14 *Fee Bill.*

Sep. 4, 1884.	Fee p'd by Adams	1 50
	Copies	3
	Equity fee	1 50
	Sh'ff McCann on notice	80
Sept. T., '84.	Cert. & 2 ord., 657, Jan. 3, '85, Con. 157	80
Ap'l T., 1885.	Con.	15
	Sh'ff McCann on notice	1 00
Sep. T., '85.	Fen. ent., &c., to U. S. C. C.	1 25
	Transcript	3 50

STATE OF IOWA, }
Dubuque County, } *ss:*

I, J. J. Dunn, clerk of the district court of the State of Iowa, in and for Dubuque county, do certify that the annexed and foregoing is a full, true, complete, and compared transcript of the records, pleadings, and papers therein set forth in the case therein mentioned, wherein E. M. Cobb was plaintiff and Schmidt Brothers defendants, as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Dubuque City, this 12th day of November, A. D. 1885.

[SEAL.]

J. J. DUNN, *Clerk,*
By J. M. WERNER, *Deputy.*

15 Endorsed: No. 123. Equity. United States circuit court, northern district of Iowa, eastern division. E. M. Cobb *vs.* Schmedt Bros. Filed 17 November, 1885. A. J. Van Duyee, clerk, &c. S. P. Adams, attorney for plaintiff. Fouke & Lyon, attorneys for defendants.

16 *Petition in Equity.*

In the District Court of Dubuque County, Iowa. September Term, A. D. 1884.

E. M. COBB *vs.* SCHMEDT BROS.

The plaintiff, E. M. Cobb, agent of the Citizens' Law and Order League of Dubuque, complaining, shows to the court and avers as follows:

Par. 1st. That he is a citizen of Dubuque county, State of Iowa.

Par. 2d. That defendants, Schmedt Bros., a firm composed of Alfred Schmedt and Titus Schmedt, at the city and county of Dubuque, at the Iowa Brewery, so called, situate upon Couler avenue, in said city, and upon lot number 5 in Brewery addition, as platted

and recorded with Dubuque deeds, have established a saloon for the keeping and sale of intoxicating liquors, to wit, whiskey, wine, gin, and beer, at retail, as a beverage, in violation of law, and are now keeping and employed and engaged in keeping said intoxicating liquors in said saloon with the intent to sell the same and with the intent to permit the same to be sold therein contrary to the provisions of section 1542 of the Code of Iowa as amended and substituted by an act of the General Assembly of the State of Iowa, approved April 3d, 1884.

Par. 3rd. That in the month of August, 1884, the said defendants, in the saloon aforesaid, did, by themselves, their clerk, agent, and servant, sell to divers and sundry persons intoxicating liquor, to wit, whiskey, wine, gin, and beer, contrary to the provisions of section 1540 of the Code of Iowa as amended and substituted by an act of the General Assembly of the State of Iowa, approved April 3rd, 1884, at retail and as a beverage.

Par. 4th. That said defendants, at the saloon aforesaid, have heretofore, to wit, since the 1st day of July, 1884, by themselves, their clerk, agent, and servant, sold, and continue from day to day to sell, intoxicating liquors, to wit, whiskey, wine, gin, and beer, as a beverage, contrary to law, at retail *and as a beverage.*

Par. 5th. That said defendants are the owners of the premises aforesaid, and are the owners of certain whiskey, gin, wine, and beer kept and contained in certain kegs, bottles, and other vessels for illegal sale upon said premises as aforesaid, and are the owners of certain furniture and fixtures on the said premises used in said business.

Par. 6th. Whereby and by reason of the premises, and in manner and form as aforesaid, the said defendants, at the saloon aforesaid, have established and are now keeping and maintaining a nuisance, to the great injury of the plaintiff and other good citizens of said county, and to the detriment of the public peace and safety, and, unless restrained by the order and decree of this court, will continue to keep and maintain said nuisance at said place in violation of law, and to the public injury. Wherefore plaintiff prays that said saloon be adjudged and decreed to be a nuisance, and that the same be abated, and said defendants be enjoined by preliminary injunction from further keeping or maintaining said saloon for the illegal sale of intoxicating liquors, and also from keeping the said liquors with intent to sell the same therein contrary to law, and also from selling the same in said saloon contrary to law, either by themselves or their clerk, agent, or servant, and that upon final hearing said injunction be made perpetual, and that plaintiff have such other and further relief as in equity he is entitled to, and also that he have judgment for costs.

S. P. ADAMS & JED LAKE,
Att'ys for Pl'ff.

STATE OF IOWA, }
Dubuque County, } *ss:*

I, ——, being first duly sworn, depose and say that I am plaintiff

in the —— foregoing petition, that I have heard the same read, and know the contents thereof, and that the several averments therein contained are true, as I verily believe.

—— ——.

Subscribed and sworn to by the above-named —— this — day of ——, 188–.

—— ——.

[Endorsed:] E. M. Cobb *vs.* Schmidt Bros. In equity. Amended petition. Filed 23 December, 1885. A. Hobbs, dep. clerk.

Amended Petition for Removal.

17 UNITED STATES OF AMERICA,
Northern District of Iowa, Eastern Division:

In Circuit Court U. S. November Term, A. D. 1885.

E. M. COBB *vs.* SCHMIDT BROTHERS.

1st. Your petitioners, the above-named defendants, show to the court that they are and for five years last past have been citizens of the United States and the State of Iowa, residing in the State of Iowa.

2nd. That long prior to the 4th day of July, A. D. 1884, and ever since that time they have been engaged in the business of brewing beer and selling the same at both wholesale and retail, and they have kept upon the premises mentioned in the petition, being the same premises upon which said beer is manufactured, which said premises have all said time belonged to and are now owned by defendants, and contain large breweries, erected for the purpose of manufacturing beer and for no other purpose, and are suited for no other purpose, a room and bar where said beer so manufactured is kept for sale at retail, which is the keeping of a saloon charged in the petition herein and not other or different, and defendants claim that such business is legal under the laws of Iowa.

18 3rd. That they have invested in said business of brewing and selling beer a large sum of money, and there is involved in this case, in addition to the personal rights of defendants, the sum of ten thousand dollars, exclusive of costs, and more than that amount of property belonging to defendants will be rendered entirely worthless if plaintiff succeeds against them in the present action.

4th. That there has been no trial or final hearing of this case.

5th. That plaintiff has filed his motion herein for a temporary injunction to restrain defen-ts from prosecuting their said business, which plaintiff is endeavoring to press to a hearing in the State court, which, if allowed, will be of irreparable injury to defendants.

6th. That the 20th General Assembly of the State of Iowa passed an enactment which defendants ask may be considered in this case, which, by its terms, went into effect on the 4th day of July, A. D. 1884, being chapters 8 & 143, laws of the 20th General Assembly of

the State of Iowa, amending sections of title XI, chapter VI of the Code of Iowa, relating to the sale of intoxicating liquors,
19 which defendants claim should be declared of no effect, which renders highly penal the prosecution of said business of defendants, and which, if enforced, as threatened, in this case, as hereinafter stated, will destroy the property of defendants so used and deprive them unlawfully of their said occupation.

7th. That under the provisions of said law defendants can be deprived of their property and punished with heavy penalties for being engaged in said business without having the opportunity and right of a trial by jury upon the questions of fact involved, and without any trial whatever except as pointed out by said act.

8th. That the supreme court of the State of Iowa in the case of Littleton *vs.* Fritz, decided at the March term, A. D. 1885, of said court, to which reference is here prayed, has declared said law in full force, and that persons in the situation of defendants can be prosecuted under it, and be deprived of property and liberty without any right of a jury trial.

9th. That under said enactments and said decision the said plaintiff has begun and is prosecuting this suit without any right to or interest therein, except what said enactment and said decision confer.

20 10th. That under said law and said decision persons who are charged with being engaged in the saloon business are guilty of maintaining a nuisance — thereby are, and their property is, discriminated against in being deprived of the same mode of trial that persons charged with manufacturing other nuisances in violation of law are allowed, and other and different and more onerous penalties and punishment are imposed against them and against the property than are denounced against persons charged with maintaining other kinds of nuisances.

11th. That under said law, and especially section 1526 as amended of the Code of Iowa, petitioners are denied the right to manufacture or sell beer or other manufactured liquors for any purpose whatsoever on account of their occupation, while persons engaged in other occupations are allowed to engage in such sales.

12th. That said law and said decision are in derogation of the rights of defendants as guaranteed by the Constitution of the United States, and especially as guaranteed by the 14 Amendment thereof, and defendants are thereby denied the equal protection of the laws of said State of Iowa, and *is* deprived, and liable to be de-
21 prived, of liberty and property without due process of law.

13th. That by said law and said decision they are denied in these proceedings in the State court the equal protection of the laws of Iowa as guaranteed by said Constitution of the United States and said amendment and by the laws of Congress, as passed for their protection.

14th. That said law-, so passed by the said 20th General Assembly of Iowa, are null and void as being contrary to the said 14th Amendment of the Constitution of the United States and the laws made in pursuance thereof, but the supreme court of the State of

Iowa has refused so to declare, holding the same binding and of full force.

Therefore defendants offer, as provided by law, to file copies of all pleadings and proceedings herein in the circuit court of the United States for the northern district of Iowa, eastern division, on the first day of its next term, and to file a bond, conditioned as provided by law, if such bond be demanded, and prays that this suit, which arises under the Constitution and laws of the United States, and the present being the first term at which said suit could be tried, and is also removable under Sec. 641 of the Revised Statutes of the United States, may be removed into the next term of the circuit court
22 of the United States for the northern district of Iowa, eastern division.

FOUKE & LYON,
McCENEY & O'DONNELL,
For Def'ts.

STATE OF IOWA, }
Dubuque County, } *ss:*

I, Albert Schmidt, being duly sworn, says that *he is* one of the defendants in this case; that *he has* heard the foregoing petition for removal read and knows its contents, and that the matters and things therein stated are true, as I verily believe.

ALBERT SCHMID.

Signed and sworn to by Albert Schmid, the affiant, this 19th day of December, A. D. 1885. Witness my hand and notarial seal.

[L. S.] H. B. FOUKE,
Notary Public.

Endorsed: E. M. Cobb *vs.* Schmid Bros. Amended petition for removal. Filed 23 December, 1885. A. Hobbs, dep. clerk.

23 *Motion to Remand.*

In Circuit Court of the United States, Northern District of Iowa, Eastern Division.

E. M. COBB *vs.* SCHMIDT BROS.

And now comes plaintiff and moves to remand said cause to the district court of the State of Iowa, in and for Dubuque county, for the following reasons:

1st. Because the petition for remand fails to state facts showing that defendants were entitled to remove said action from the State court under the provisions of Sec. 641 of the Revised Statutes of the United States.

2nd. Because said petition fails to state facts sufficient to give — court jurisdiction of said action.

3rd. Because said petition fails to state facts showing that defendants are denied or cannot enforce in the judicial tribunals of the State of Iowa any rights secured to them by any law providing for the equal, civil rights of citizens of the United States, or of all per-

sons within the jurisdiction of the United States, within the provisions and purview of section 641 of the Revised Statutes of the United States. And

24 4th. Because said action does improperly removed from said State court, as it involves no dispute or controversy within the jurisdiction of this court.

S. P. ADAMS,
JED. LAKE,
Att'ys for Plaintiff.

Endorsed: E. M. Cobb *vs.* Schmidt Bros. Motion to remand. Filed Nov. 17, 1885. A. Hobbs, dep'y clerk.

25 E. M. COBB *vs.* SCHMIDT BROTHERS.

To the honorable the Supreme Court of the United States.

The appeal of Schmidt Brothers, the above-named defendants and appellants, respectfully shows—

That upon the 4th day of September, A. D. 1884, the above-named complainants filed his petition in equity in the district court of Dubuque county, Iowa, against the defendants and appellants for the purpose of enjoining them in their business and to compel them to desist in its prosecution.

That afterwards these defendants and appellants filed their petition to remove said cause into the next term of the circuit court of the United States for the northern district of Iowa, in which district said county of Dubuque was situate, which petition was allowed by said State court and said cause remanded.

That afterwards, in said United States circuit court, a motion was made by said complainant to remand said cause for the reasons stated in said motion.

26 That afterwards, in said court, complainant was allowed to amend his original petition.

That afterwards defendants and appellants, by leave of court, filed their amended petition for removal.

That said motion to remand was afterwards submitted, and on the 1st day of February, A. D. 1886, a final decree was made and pronounced in said cause, wherein it was in substance adjudged and decreed that the United States circuit court had no jurisdiction to hear and determine said cause, and that said cause should be remanded to the State court from which the same had been removed, to which decree the defendants and appellants then and there duly excepted and prayed an appeal to this court.

Wherefore the appellants appeal from the whole of said decree of said circuit court of the United States, and respectfully pray that the decree of said circuit court and the said bill of complaint or petitions and amendments, pleadings, petition, and amended petition for removal, and proceedings in said cause may be sent to the Supreme Court without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree

27 of the said circuit court and every part thereof may be reviewed, and a decree made declaring that said circuit court

of the United States has jurisdiction to hear and determine said cause or such other decree as to the said Supreme Court shall seem just.

Dated Dubuque, Feb'y 1, 1886.

FOUKE & LYON.
McCENEY & O'DONNELL.

H. B. FOUKE,
Of Solicitors for Appellants, Counsel.

Endorsed: E. M. Cobb *vs.* Schmidt & Bros. Petition for appeal to Supreme Court. Filed 1 day of February, 1886. Alfred Hobbs, deputy clerk.

28 U. S. Circuit Court, Northern District of Iowa, Eastern Division. November Term, 1885. Equity.

Wednesday, 23 day of December, A. D. 1885. Thirty-first day.

E. M. COBB
vs.
SCHMIDT BROS. } No. 123.

The above-entitled action coming on to be heard upon the motion to remand, heretofore filed, S. P. Adams, Esq., and Jed. Lake appearing for complainants, and Fouke & Lyon and McCeney and O'Donnell for defendants, and the same having been argued by counsel, were submitted to the court.

Monday, 1st day of February, A. D. 1886. Thirty-sixth day.

E. M. COBB
vs.
SCHMIDT BROS. } No. 123. Equity.

This day this cause coming on to be heard, upon the motion of complainant to remand the same to the State court,
29 the complainant having, by leave of court heretofore made, filed his amendment to his bill of complaint, and the defendant, by leave of court heretofore given, having filed his amended petition for removal of said cause into this court, and the court having read as well the amended pleadings of plaintiff and the amended petition for removal of defendant, and having considered the same, and having heard the said parties by their respective counsel, and being fully advised grants said motion to remand made by said plaintiff upon the ground that there is no Federal question involved in said cause. It is therefore ordered, adjudged, and decreed that said cause be remanded to the district court in and for Dubuque county, Iowa, from which it came, and that plaintiff recover his costs in this court against defendants; to all of which the defendants, by their counsel, then and there excepted.

And thereupon the defendants, in open court, file their petition for appeal to the Supreme Court of the United States from said decree and present for approval their supercedeas bond.

The court, after argument by counsel for the respective parties, being fully advised, allows said appeal to the Supreme Court
30 and approves said supercedeas bond, which is done accordingly.

31 UNITED STATES OF AMERICA, } *ss:*
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the United States circuit court for the northern district of Iowa, do hereby certify that the foregoing and annexed is a full, true, complete, and compared transcript of the records, pleadings, and papers therein set forth in the cause wherein E. M. Cobb was plaintiff and Schmidt Bros. [were] defendant-, as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Dubuque, in said district, this 12th day of February, A. D. 1886.

[Seal Circuit Court U. S., Northern District of Iowa. Dubuque.]

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa,
By ALFRED HOBBS, *Deputy.*

Fees on transcript, $7.85, paid by appellant.

[Endorsed:] Supreme Court U. S. Schmidt Bros., appellants, *vs.* E. M. Cobb, appellee. Complete transcript.

Endorsed on cover: N. Iowa C. C. U. S. No. 1287. Schmidt Brothers, a firm composed of Albert Schmidt and Titus Schmidt, appellants, *vs.* E. M. Cobb. Filed March 11, 1886.

The court, after argument by counsel for the respective parties, being fully advised, allows said appeal to the Supreme Court and approves said supercedeas bond, which is done accordingly.

UNITED STATES OF AMERICA, }
Northern District of Iowa, } *ss:*

I, A. J. Van Duzee, clerk of the United States circuit court for the northern district of Iowa, do hereby certify that the foregoing and annexed is a full, true, complete, and compared transcript of the records, pleadings, and papers therein set forth in the cause wherein E. M. Cobb was plaintiff and Schmidt Bros. [were] defendant-, as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Dubuque, in said district, this 12th day of February, A. D. 1886.

[Seal Circuit Court U. S., Northern District of Iowa. Dubuque.]

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa,
By ALFRED HOBBS, *Deputy.*

Fees on transcript, $7.85, paid by appellant.

[Endorsed:] Supreme Court U. S. Schmidt Bros., appellants, *vs.* E. M. Cobb, appellee. Complete transcript.

Endorsed on cover: N. Iowa C. C. U. S. No. 1287. Schmidt Brothers, a firm composed of Albert Schmidt and Titus Schmidt, appellants, *vs.* E. M. Cobb. Filed March 11, 1886.

SUPREME COURT U. S.
FILED.
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JAMES H. McKENNEY
CLERK.

No. 1287.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

SCHMIDT BROTHERS, *Appellants*,

vs.

E. M. COBB, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Iowa Eastern Division.

Motion ~~to Advance~~, to Dismiss the Appeal, and to Affirm the Order of the Circuit Court remanding said cause.

S. P. ADAMS, JED LAKE and M. H. BEACH,
Solicitors for Complainant.

FOUKE & LYON and McCENEY & O'DONNELL,
Solicitors for Appellants.

No. 1287.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 885.

SCHMIDT BROTHERS, *Appellants*,

vs.

E. M. COBB, *Appellee*.

Appeal from the Circuit Court of the United States for the Northern District of Iowa Eastern Division.

S. P. ADAMS, JED LAKE and M. H. BEACH,

Solicitors for Complainant.

FOUKE & LYON and McCENEY & O'DONNELL,

Solicitors for Appellants.

Motion to Dismiss the Appeal, and to Affirm the Order of the Circuit Court remanding said cause.

MOTIONS.

Now comes the complainant and moves the court:

1st. To dismiss said appeal for the reason that the Circuit Court had no jurisdiction of the cause. And

2d. To affirm the order, judgment and decree of said Circuit Court, remanding said cause to the State Court, for the reason that the record fails to show that any federal question is involved in said cause, and further that it is manifest from the record that

said appeal was taken for delay only, even in case it be held that this court has jurisdiction, as will appear from the brief statement herewith submitted.

S. P. ADAMS, JED LAKE AND M. H. BEACH.
Solicitors for Complainant.

BRIEF STATEMENT OF FACTS.

On the 4th day of September, 1883, complainant, a citizen of Iowa, filed in the district court of the state of Iowa, in and for Dubuque county, his complaint in equity, alleging that the defendants who were and are citizens of Iowa, at their place of business in the city of Dubuque, Iowa, have established a saloon and place for the keeping and sale of intoxicating liquors, to-wit; whisky, wine, gin, and beer: and are keeping said liquors in said saloon, with the intent to sell the same therein as a beverage, contrary to the provisions of section 1542 of the Code of Iowa as amended and substituted by the act of the 20th General Assembly of the state of Iowa, approved April 3d, 1884. And further, that in the month of August, 1884, said defendants in their said saloon sold to divers and sundry persons, intoxicating liquors contrary to the provision of Sec. 1540, of the Code of Iowa, as amended by said 20th General Assembly. And further, that said defendants at said saloon, have, since the 15th day of July, 1884, by themselves, their agents and sevents, sold, and continue from day to day to sell said liquors therein, to be drank as a beverage contrary to law.

Complainant therefore prays that said saloon may be adjudged and decreed to be a nuisance, and that the same be abated and said defendant be enjoined by preliminary injunction from further keeping or maintaining said saloon for the illegal sale of intoxicating liquors, and also from selling the same in said saloon contrary to law. And that upon final hearing said injunction be made perpetual.

This action is brought under the provisions of Sec. 1543 of

said Code of Iowa, as amended by said 20th General Assembly, which enacts that in cases of the violation of the provision of Sec. 1540, or Sec. 1542 of said Code, prohibiting the selling or keeping for sale, intoxicating liquors contrary to law, the building in which such unlawful selling or keeping with intent to sell, is carried on, is a nuisance. And further provides that any citizen of the county in which such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and enjoin the same.

On the 21st day of September, 1885, defendants filed in the state court their petition for removal to the circuit court of the United States, upon the ground that the statutes aforesaid were in violation of the Civil Rights' Law, and the constitution of the United States, especially the 14th amendment thereof.

Which petition was allowed and the case removed.

In the circuit court, defendants amended their petition for removal, and averred therein:

1st. That they were and for five years last past have been citizens of Iowa.

2d, That long prior to July 4th, 1884 they had been engaged in brewing beer and selling the same at wholesale, and have kept upon their premises a room and bar where said beer so manufactured is kept for sale at retail, which is the keeping of a saloon charged in the petition herein.

3d, That they had invested in said business of brewing and selling beer, a large sum of money, to wit, the sum of ten thousand dollars, exclusive of costs, which will be rendered entirely worthless if plaintiff succeeds in this action.

4th, That there has been no trial or final hearing of this case.

5th, That plaintiff has filed his motion for a temporary injunction to restrain defendants from prosecuting their said busines, which if allowed will work an irreparable injury to defendants.

6th, That the 20th General Assembly of Iowa passed an act which went into effect July 4th, 1884, which renders highly penal the prosecution by defendants of their said business.

7th, That under the provisions of said act defendants can be deprived of their property and punished with heavy penalties for being engaged in said business, without the right of a jury trial.

8th, That the Supreme Court of Iowa has adjudged said act valid and in full force.

9th, That under said act and said decision plaintiff is prosecuting this action.

10th, That under said law and said decision saloon keepers are discriminated against on account of their occupation, and are denied the same mode of trial accorded to other persons who are maintaining other kinds of nuisance.

11th, That under said law, and especially under Sec. 1526 of said code as amended, defendants are denied the right to manufacture or sell beer for any purpose whatever, on account of their occupation.

12th, That said law and said decision are in derogation of defendants' rights as guaranteed by the constitution of the United States, and especially by the 14th amendment thereof, as they are thereby denied the equal protection of the law, and are deprived of liberty and property without due process of law.

13th, That by said decision they are denied the equal protection of the laws of Iowa.

14th, That said laws are null and void, as contrary to said amendment, but the Supreme Court of Iowa has refused so to declare.

Complainant's motion to remand to State court was sustained, upon the ground that no federal question was involved, and decree rendered accordingly.

From that decree this appeal is prosecuted.

ARGUMENT.

Appellants in the second paragraph of their amended petition for removal aver, that long prior to the enactment of the statute in question they had been engaged in brewing beer and selling the same at wholesale, and in the third paragraph they aver that they have invested in said business property of the value of ten thousand dollars, which will be rendered entirely worthless if plaintiff succeeds in this action.

How the successful prosecution of this action can interfere in any way with the manufacture and sale of beer at wholesale by these parties is not apparent.

The complaint of plaintiff simply charges that defendants are keeping a saloon upon their brewery premises, and selling beer therein as a beverage at retail, and in said second paragraph, appellants admit that "they have kept upon their premises a room and bar where said beer so manufactured is kept for sale at retail, which is the keeping of a saloon charged in the petition herein."

It is this "room and bar," otherwise called a saloon, that is sought to be abated in this action, and nothing more. The manufacture of beer, or the sale of the same at wholesale by appellants is not, and cannot be affected by this proceeding; it is only the sale and keeping for sale in said saloon, of intoxicating liquors at retail as a beverage that is herein sought to be suppressed or enjoined. Appellants appear herein simply in the role of saloon keepers. The fact that they are brewers and wholesale dealers in beer cuts no figure under this record.

As to the claim of appellants that they can be deprived of their property and punished with heavy penalties without the right of jury trial, and that they are discriminated against as a class, and are thus denied the equal protection of the laws, and are deprived of property without due process of law; we simply say that such claims are all frivolous. All that is sought to be done in this proceeding, and all that can be done herein is, to

compel defendants to close up their saloon, and cease to maintain the nuisance complained of. No punishment or penalty is sought to be inflicted, and none can be inflicted in this proceeding. No property is taken or can be taken. No liberty is restrained, or sought to be restrained, except the liberty to maintain a nuisance, and that is sought to be accomplished by a trial according to the forms of long established judicial proceedings. The only question properly raised by this record is, whether the State has the right, under the constitution of the United States. to prohibit the sale of intoxicating liquors at retail, as a beverage. And since the decisions in Bartemeyer vs. Iowa, 18 Wall 127, and Beer Co. vs. Massachusetts, 97 U. S. 25, and Foster vs. Kansas, 112 U. S. 205, this is no longer an open question anywhere, certainly not in this court. And so we say that the Circuit Court did not err in holding that no federal question is involved in this record ; and further we say that this appeal was manifestly taken for delay only, and hence we ask that this cause be advanced, the appeal dismissed, and the decree of the Circuit Court remanding the case be affirmed.

S. P. ADAMS, JED LAKE, and M. H. BEACH,
Solicitors for Complainant.

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S. P. ADAMS, JED LAKE, and M. H. BEACH,
Solicitors for Complainant.

Office Supreme Court U. S.
FILED.
OCT 9 1886
JAMES H. McKENNEY,
CLERK.

No. 1287.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A.D. 1886.

SCHMIDT BROTHERS, *Appellants*,
vs.
E. M. COBB, *Appellee*.

Appeal from the Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

Reply of Appellee to Argument of Appellant.

FOUKE & LYON and MCCENEY & O'DONNELL,
Solicitors for Appellants.
S. P. ADAMS and JED LAKE, Solicitors for Appellee.

No. 1287.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A.D. 1886.

SCHMIDT BROTHERS, *Appellants*,
vs.
E. M. COBB, *Appellee*.

Appeal from the Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

Reply of Appellee to Argument of Appellant.

FOUKE & LYON and MCCENEY & O'DONNELL,
Solicitors for Appellants.
S. P. ADAMS and JED LAKE, Solicitors for Appellee.

REPLY.

The best evidence that appellants are aware that they have no case here is the fact that they feel compelled, in order to make a show of contest, to drag in the case of State vs. Walruff, 26 Fed. Rep. 178, and to republish several pages of the opinion of Judge Brewer in that case, notwithstanding according to their own admission on page 5 of their argument, Judge Brewer ordered this case remanded to the state court.

Now whilst by no means conceding the correctness of the decision in the Walruff case, the distinction between that case and this is world wide. In that case the county attorney was proceeding to abate and shut up a fifty thousand dollar brewery as

a nuisance, and to absolutely prohibit the further manufacture of beer in that establishment; thus of course destroying the business of the owner, and rendering the whole property comparatively valueless.

In the case at bar the appellants are sought to be enjoined from keeping a saloon in a room in one corner of their $10,000 brewery establishment, and from selling beer therein at retail as a beverage. This and nothing more. No attempt is here made to arrest the operation of appellants' brewery; and the suppression of their saloon would no more interfere with the sale of beer by appellants at wholesale, than would the suppression of any other one of the two hundred saloons which appellants speak of as existing in this county, and which happen to be supplied with beer by appellants. For we assume that this court will take judicial notice that it does not require a $10,000 brewery to furnish beer for one saloon in a locality cursed with two hundred of these nuisances; and it may be fairly assumed that at least from fifty to seventy-five of these saloons are supplied with beer from this brewery. Thus under the claim of appellants this court is asked to establish or recognize a doctrine which would enable appellants to intervene under the laws of Iowa in any suit instituted to abate any saloon which the appellants supply with beer, and remove such suit to the federal court upon the ground that such abatement would deprive them of a customer, and thus damage their business and destroy their property, in violation of the fourteenth amendment. Such is the logical result of appellants argument.

As to the claim of appellants that a federal question is involved in this case, we have only to say that if their theory be correct, that the state court is deprived of its jurisdiction to enforce its police regulations enacted in the interest of the public morals or of the good order of its citizens, whenever a defendant claims that such enforcement involves a construction of some clause of the federal constitution, then it seems to be a useless ceremony

for the state to attempt such enforcement in its own courts, and that it would be better that the circuit courts of the United States should at once be declared police courts, with full police court power. We had supposed that the state court was the proper forum to enforce the police regulations of the state or municipality, and that if the constitutional rights of a defendant are deemed to be infringed upon, or denied by state laws or state courts, that the proper remedy of such defendant is by writ of error to the Supreme Court of the state.

As to appellants' arraignment of the legislature of Iowa for providing among other things for the taxation of an attorney's fee against defendants in saloon injunction cases, the court will notice that this legislation occurred some two years after the institution of this suit. Besides, since counsel assert that in "no other case in Iowa are attorneys fees allowed against a defendant," we desire to call attention to the fact that for several years past the statutes of Iowa have allowed and provided for the taxation of attorneys's fees against defendants, in suits for the collection of the school fund, in actions on attachment bonds, and in prosecutions under the game law; and further, that in probably seven-eighths of all the judgments rendered on promissory notes and foreclosure of mortgages during the last six years in Iowa, an attorney fee, ranging in amount from ten to three hundred dollars, has been allowed by law and included in the costs taxed against the defendant.

In conclusion, we insist as before, that no federal question is involved in this case, and that the circuit court did not err in remanding it to the state court.

S. P. ADAMS and JED LAKE,
Solicitors for Appellee.

Supreme Court U. S.
FILED
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NO. 1287.

In Supreme Court of the United States.

OCTOBER TERM, 1886.

SCHMIDT BROTHERS, *Appellants*,
vs.
E. M. COBB, *Appellee.*

Appeal from the Circuit Court of the United States for the Eastern Division, Northern District of Iowa.

ARGUMENT OF APPELLANT RESISTING MOTION TO DISMISS APPEAL AND AFFIRM THE ORDER OF CIRCUIT COURT REMANDING SAID CAUSE.

FOUKE & LYON AND MCCENEY & O'DONNELL,
Solicitors for Appellants.

S. P. ADAMS AND JED LAKE,
Solicitors for Appellee.

No. 1287.

IN SUPREME COURT OF THE UNITED STATES.

SCHMIDT BROTHERS, *Appellants*,
vs.
E. M. COBB, *Appellee*.

Appeal from the Circuit Court of the United States for the Northern District of Iowa, Eastern Division.

Brief and Argument of Appellants' in Answer to the Motions of Appellee to Dismiss the Appeal and to Affirm the Judgment of the Circuit Court Remanding Said Cause.

The brief statement of facts attempted by appellee does not, we fear, give to the court a full understanding of appellants' contention.

These causes (No. 1287 and 1288) arise under the amended prohibitory law, passed by the Twentieth General Assembly of Iowa, and removed to the Federal Court to test the validity of the law as against the rights of appellants in continuing to carry on after the law went into effect, a business, which prior thereto, had been legal and which had grown up under the fostering care of enactments, which, since 1858, had been prominent upon the statute books of the state.

The cases do not involve merely the right to keep a saloon, as is is claimed by appellee and as was decided in the court

below. But as far as the present No. 1287 is concerned, fairly present this question:

Appellants, according to the allegations of their petition for removal as amended state: That long prior to the enactment by the Twentieth General Assembly, they had engaged and were continuously up to the present time engaged in the manufacture of beer in a large and expensive brewery, which had cost over $10,000, and that such manufacture was for the purpose of selling the same at wholesale and retail. That in said brewery was a room or bar in which they sold at retail the beer so manufactured at such brewery, and that the selling of such beer in said room or bar was the keeping of a saloon complained of in the appellee's petition and not other or different.

That the issuance of the injunction prayed for and the success of plaintiff in said suit would be of irreparable injury to appellants and render entirely worthless the large brewery property so erected by them.

Then from the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th paragraphs of appellee's statement, on page 4, the other questions in the case may be ascertained.

The several provisions of the law to which attention is called are as follows:

Chapter 8 of the Laws of the Twentieth General Assembly.

Striking ale, wine and beer clause from Section 1555 of the Code. Be it enacted, etc.

SEC. 1. That Section 1555 Chap. VI, Title XI of the Code, be and the same is hereby repealed and the following is enacted in lieu thereof:

SEC. 1555. Wherever the words intoxicating liquors occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever, and no person shall manufacture for sale or sell, or keep for sale, as a beverage, any intoxicating liquors whatever, including ale, wine, and beer; and the same provisions and penalties of the law in force relating to intoxicating liquors, shall in like manner be held and construed to apply to violations of this act, and to the manufacture, sale or keeping for sale, or keeping with intent to sell, or keeping or establishing a place for the sale of ale, wine and beer and all other intoxicating liquors whatever.

Section 1525 of the Code as amended by chapter 143 of the laws of the Twentieth General Assembly is as follows:

SEC. 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited shall be deemed guilty of a misdemeanor, etc.

Section 1526 as amended is as follows:

Any citizen of the state except hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners, is hereby permitted within the county of his residence to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, etc.

Section 1540 as amended says:

If any person not holding such permit by himself, etc., shall directly or indirectly or by any device, sell or in consideration of the purchase of any other property, give to any person any intoxicating liquors, he shall be deemed guilty of a misdemeanor, etc.

Section 1541 provides against mixing beer, wine or cider with other intoxicating liquors.

Section 1542, as amended, says:

No person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors, with intent to sell the same within this state, or to permit the same to be sold therein in violation of the provisions hereof; and any person who does these things shall be deemed guilty of accumulating penalties, until they reach $300 and six months in the county jail.

Section 1543, as amended, is in full as follows:

SEC. 1543. In cases of violation of the provisions of either of the three preceding sections, or of section 1525 of this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture or sale, or keeping, with intent to sell, use or give away, of any intoxicating liquors, is carried on, or continued, or exists, and the furniture, fixtures, vessels or contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish, or continue or use any building, erection or place, for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding $1,000 and costs of prosecution and stand committed until the fine and costs are paid, and the provisions of chapter 47, title 27, of this code, shall not be applicable to persons committed under this section. Any citizen of the county, where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of

any injunction granted in such proceedings, shall be punished as for contempt, by a fine of not less that five hundred nor more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court.

Of course reference is made to the entire liquor law, of which the court will take judicial notice.

The supreme court of Iowa in *Littleton* vs. *Fritz* 65 Iowa 488, and in *Pontius* vs. *Winebrenner*, Ibid 591, have affirmed the binding force of this law in every particular.

This action was removed to the Federal court under section 641 of the Revised Statutes, and also under the act of March, 1875, as presenting a Federal question.

The proposition for consideration is, was it properly remanded? The court below make the order because in its judgment no Federal question was presented.

The pretence of counsel for appellant that this appeal was taken for delay is not true in fact, and we suppose will need no further notice.

We claim not only is there a Federal question involved, but one which has never yet received the judgment of this court. Our anxiety is that we will not be able to present it in the way its importance demands.

The bill of complaint alleges that the defendants at the Iowa *Brewery* so called, situated in *Brewery* Addition to Dubuque, have established a saloon for the keeping and sale of intoxicating liquors, to-wit: whisky, wine, gin and beer at retail as a beverage, in violation of law; and that defendants sold the said liquors in violation of law; and that they are the owners of the premises, the whisky, beer, etc., and of certain furniture and fixtures. That by reason of the premises defendants have established and are now keeping and maintaining a nuisance in violation of law, and it is prayed that it may be abated, etc.

The principal allegation in the petition for removal, and which is in answer to the allegations of the bill of complaint, is as follows:

2d. That long prior to the 4th day of July, A. D. 1884, [the day this new law went into effect] and ever since that time they [the defendants] have been engaged in the business of brewing beer and selling the same at both wholesale and retail,

and they have kept upon the premises mentioned in the bill of complaint, being the same premises upon which said beer is manufactured, which said premises have all said time belonged to, and are now owned by defendants, and contain large breweries erected for the purpose of manufacturing beer, and for no other purpose, and are suited for no other purpose, a room and bar where said beer so manufactured is kept for sale at retail, which is the keeping of a saloon charged in the bill of complaint herein, and not other or different. And defendants claim that such business is legal under the laws of Iowa.

3. That they have invested in said business of brewing and selling beer a large sum of money, and there is involved in this case in addition to the personal rights of defendants the sum of ten thousand dollars, exclusive of costs, and more than that amount of property belonging to defendants will be rendered entirely worthless if plaintiff succeeds against them in the present action.

The facts stated in the petition for removal are intended to present the very questions raised in the case of the *State* vs. *Walruff* in the United States circuit court for the district of Kansas, reported in the 26th Fed. Rep. No. 4, p. 178, which the circuit judge held was one for Federal disposition, while at the same time he ordered the present suits to be remanded.

As to whether he overlooked the distinctive facts in this particular case in giving his decision can serve no useful purpose to determine, for this court may eventually hold that the decision in the Kansas case was erroneous; but so cogent are the reasons assigned in that, why this case should be retained and disposed of by the federal court, that at the risk of being sued for infringing his copyright, I shall make use very largely of that opinion as an argument here.

For the purpose of this question it must be premised, that the only keeping of a saloon, of which the complaint complains, is the selling within the limits, and upon the brewery premises, of the beer manufactured in the brewery erected long prior to the passage of the present law, and that the right to manufacture includes, as the argument will demonstrate, a right to dispose of the product of such manufacture, for the petition for removal states that the sale of the beer manufac-

tured upon said premises *is the keeping of a saloon alleged in the bill of complaint and not other or different.*

The difference between the facts in the Kansas case and this is simply that the Kansas man was refused a permit after application, while under the Iowa law he is in effect prevented from making application. He belongs to a *class* of persons to whom permits are absolutely denied.

It is apparent from this record that the appellants have invested large properties in a business which, when established, was perfectly legitimate, and by this law they are stripped of the value of such properties, and that not as the indirect and consequential result of legislative changes, which are not intended to jeopardize any class of rights, but by a direct prohibition upon the only use for which such properties are designed, adapted and valuable. Is a state potent, through the forms of law, to take from a citizen by direct action the value of his property without compensation? and is this commonwealth so powerful and so absolutely above all restraining authority as to be able to discriminate against a particular class, or a particular employment, as absolutely to destroy, not only the means embarked in such enterprise, but the right of the party to pursue his avocation? If not, has the state, by its legislative and judicial departments, deprived the citizens affected of the "equal protection of the law?"

I need not quote the exact language employed by the court in the *Bartemeyer* case, 18 *Wall.*, 129, but I put the inquiry, is not this case of that class which raises the grave questions suggested by Mr. Justice Miller?

Justice Bradley, concurring in the Bartemeyer case, (referring to the liquor law,) says:

"The law, therefore, was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law, does not arise. No one, however, has ever doubted that the legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with the vested rights of property. When such right stands in the way of the public good, they may be removed by awarding compensation to the owner."

Mr. Justice Field also says:

"I have no doubt of the power of the state to regulate the sale of intoxicating liquors when such sale does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any state the fourteenth amendment affords protection."

In order that the magnificent reasoning of Judge Brewer may lose nothing by being garbled, I give, in his own language, the four reasons he presents for retaining federal jurisdiction of the Kansas case:

"I am not content to leave this case upon the authoritative suggestions of the supreme court. As a new matter, it is clear to me that there is a federal question giving right of removal, and here I assert these propositions:

First. Debarring a man, by express prohibition, from the use of his property for the sake of the public, is a taking of private property for public uses. It is the power to use, and not the mere title, which gives value to property. Give a man the fee-simple title to a flour-mill, coupled with an absolute prohibition on its use, of what value is it to him? In the most common and ordinary case of taking private property for public uses,—the condemnation of the right of way for a railroad,—the title is not divested. The owner still retains the fee-simple, and he is only debarred from the use. When the railroad abandons the use, he retakes it. In the leading case of *Pumpelly* vs. *Green Bay Co.*, 13 Wall. 166, which was a case where land was overflowed in consequence of the erection of a dam, the supreme court thus disposed of this matter:

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of of the public, it can destroy its value entirely, can inflict irre-

parable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the case of *Munn* vs. *Illinois*, 94 U. S. 141, Mr. Justice Field uses this language:

"All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them, deprives him of all that is desirable or valuable in the title and possession. If the constitntional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

I meet here the common argument that, when private property is taken for public use, there is always a transfer of the use from one party to another; that here the use is not transferred, but only forbidden; and that this deprivation of the use is only one of consequential injuries resulting from a change of policy on the part of the state for which no compensation or redress is allowed. It is *damnum absque injuria.* The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed in order that another may be required. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public mpy acquire the benefit in another direction. So, where land is flowed by a mill-dam. And thus it is generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason, and upon no other ground, could it be disturbed. Of course, in this, as in other cases, some use remains to the owner; but here, as elsewhere, the use which is of special value, is taken from him for the benefit of the public; and this is not a consequential, but a direct result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct

command, and says, "Stop your manufacturing." It is idle to talk of consequential results and injuries when the law, in direct language, forbids the use of the premises for a brewery.

I assert, *secondly*, that natural equity, as well as constitutional guaranty, forbids such a taking of private property for the public good without compensation. In the case of *State* vs. *Mugler*, 29 Kan. 252, this question was presented to the supreme court of Kansas, and, as a member of that court, I then expressed the same opinion. I am aware that my brethren differed with me, and that the court held that the state constitution carried no such prohibition. In view of that decision I shall have little to say in respect to the guaranties in the state constitution. I may, however, be permitted to say, and I do it with the highest respect for the members of that court, and with the utmost deference to its opinions and judgments, that in the light of the frequent discussions of the questions since that decision, the more I have reflected thereon, the more profoundly am I convinced that the guaranties of safety and protection to private property contained within our state constitution, forbid that any man should be thus despoiled of that which gives value to his property, for the sake of the public good, without first receiving compensation for that which is taken from him.

Turning to the opinions of other courts, I find strong indorsement of the proposition I have asserted. In the case of *Lake View* vs. *Rose Hill Cemetery Co.*, 70 Ill. 192, the court says:

"We are unwilling to concede the existence of an indefinable power, superior to the constitution, that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use, without compensation, whether such property consists of franchises or tangible forms of property."

The constitution of New Jersey contains no such guaranty as ours, yet the supreme court of that state, in *Sinnickson* vs. *Johnson*, 17 N. J. Law, 129, declares "that this power to take private property reaches back of all constitutional provision, and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the

other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

The constitution of New York was similarly deficient, and yet, in *Gardner* vs. *Newburgh*, 2 Johns. Ch. 162. Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. After citing several continental jurists on this right of eminent domain, he says that, while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed, must be indemnified; and he adds that the principles and practice of the English government are equally explicit on this point.

Were similar action taken by the state in respect to other industries, I can but think the vigor of constitutional guaranties would seem clearer. In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar, and, in the opinion of some, a deleterious article. Yet the industry is legal, the manufacture not forbidden. Suppose the next legislature should believe that glucose was injurious to the public health, and forbid its manufacture, could the wheels of that manufactory be stayed, and the value of that investment be destroyed, without compensation? Take, also, the illustration of playing cards, which, by reason of their use for gambling purposes, are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established, when, as now, a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority? Or, take a still stronger illustration. This is a corn-growing state, yet wheat also is raised abundantly, and many flour-mills exist. Suppose the legislature should determine that the best interests of the state would be promoted by stopping the growing of wheat, and increasing the growing of corn, and to that end should

prohibit the milling of flour, must the owners, without compensation, abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guaranty, compel compensation as a condition to such sacrifice? Yet who can state what the law will recognize as a legal distinction between those cases and this. Of course, it will be said that no legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

Thirdly. I affirm that, no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not "due process of law" if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public, without compensation. It is a mistake to say that the forms of law constitute "due process." No complete and perfect definition of the phrase "due process of law" has yet been given. The most familiar, and one for ordinary cases, sufficiently accurate, is that given by Daniel Webster, in the celebrated *Dartmouth College Case*,—the "law of the land" being substantially equivalent to "due process of law,"—as follows: "By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial." But, as said by Mr. Justice Miller in *Davidson* vs. *New Orleans*, 96 U. S. 104, it is probably better "to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." In the same case Mr. Justice Bradley adds these words:

"In judging what is 'due process of law,' respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

In *Murray's Lessee* vs. *Hoboken L. & I. Co.*, 18 How. 276, the supreme court thus limits the meaning of the phrase:

"The constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."

Now, in the case at bar, while judicial proceedings are prescribed, yet the spoliation is the direct command of the legislature, and the judicial proceedings are only the machinery to execute that command. No discretion is left to the courts. The legislature has in terms, said to defendants, "Stop your use of your brewery," and has directed the courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused valueless manufacture. As well might the executive, as the courts, be charged with the enforcement of this command. Such a command, no matter how enforced, operative to deprive a citizen of the value of his property, without compensation, is, in the language of Mr. Justice Bradley, *supra*, "arbitrary, oppressive, and unjust," and, therefore, should be "declared to be not due process of law."

Fourthly, and as a necessary consequence of the preceding: Legislation which operates upon the defendants as does this is in conflict with the Fourteenth Amendment, and, as to them, void. At least, it presents a question arising under such amendment, as to which they are entitled to the opinion and judgment of the federal courts."

I do not lose sight of the fact that in this case there is only an attempt to stop the sale of this manufactured beer. This attempt without compensation to the owner of the brewery for the money invested in the business, is as much confiscation as depriving him of the power to manufacture. As quoted above "all that is beneficial in property arises from its use, and the fruits of that use, and whatever deprives a person of them deprives him of all that is valuable or desirable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession and allows

a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

And the other pretense, that while the legislature may prevent the manufacture for sale at home, it may permit such manufacture for sale and consumption abroad, is equally untenable, because any limitation upon the right to sell at home where the property is manufactured is as much a deprivation as an absolute prohibition, differing in degree, may be, but not in kind. And it is equally as poor morals as poor law, that a citizen of Iowa may manufacture intoxicating liquors, if he will sell them to persons living beyond an imaginary state boundary, but he shall not manufacture to sell to persons at home. The right to manufacture carries with it the right to sell, and the right to sell carries with it the right to sell to whomsoever will purchase. The restriction of this right is as much an invasion of the citizens' prerogative, as the mandate which prevents him from manufacturing in the first instance.

It is scarcely worth while to enter into any further discussion of the question as to what is "due process of law," for the reason that the last clause of the amendment, upon which we rely, "nor shall any state deny to any person within its jurisdiction the equal protection of the laws," covers all infringements of the rights of persons, whether committed with or without due legal process. So that if from this record it is made to appear that the appellants are denied the equal protection of the laws it can make no material difference to their right to relief whether the deprivation is or is not through the forms of law provided in this state.

I desire to submit a few considerations regarding the police power of the state. Great stress was laid in the argument below upon the infinite authority of the state by virtue of its police power, and it was claimed to be beyond the control of federal jurisdiction. The danger of this claim cannot be too persistently pressed. What is the police power of a state? Its limits have never yet been certainly and distinctively circumscribed; no general rule of certain definition has yet been announced prescribing its limits or setting bounds to its authority. And here is where the danger lies. The inclination, when all other sources of authority fail, to justify the action of the state

by reason of its police power is the source of the danger to the personal rights of the citizen.

The proposition ought not to be successfully challenged, that the Fourteenth Amendment has extended federal jurisdiction without limitation over all classes of legislation by the state which in any way atttempt to take from a citizen his life, liberty, or property without due process of law, or which denies to any person within its jurisdiction the equal protection of the law; and while the police power is a great, undefined excuse for all sorts of questionable enactments, when this character of legislation becomes inimical to classes and conditions of people and deprives them of rights which are enjoyed by other inhabitants and inflicts burdens upon them which the public at large does not have to bear, then, by whatever name it may be called, and under whatever authority it may claim to have been invoked, it becomes obnoxious to the amendments of the Federal constitution which were adopted as checks upon the unjust and discriminating legislation of the state authorities.

As bearing upon this question reference is requested to:

In the matter of the application of Jacobs, 98 N. Y. 98.
The People ex rel vs. *Otis*, 90 N. Y. 48.
Weinhamer vs. *People*, 13 N. Y., 411.

It is not pretended for a moment that any attempt has been made by the legislature to compensate these appellants for the loss they would sustain by being deprived of the use of their property, nor by being prohibited from selling the product of their toil and investment. They are not only proscribed in their attempts to manufacture and sell their product, but they cannot receive a permit to manufacture or sell in a legal way, by reason of their occupation, which, prior to the law under consideration, was perfectly legitimate.

By the proceedings attempted in this case, an injunction is sought against the prosecution of their business, and they are denounced as criminals, without an opportunity by the law of the land to have their guilt or innocence established.

By the construction placed upon Sec. 1543 by the supreme court of Iowa this proceeding is perfectly legal, before the question of guilt or innocence has been tried.

This it is submitted is a violation of both clauses of the Fourteenth Amendment.

In this proceeding the sole and only purpose under the law is to establish the fact that a crime has been committed by the appellants, and to abate the nuisance which it is claimed it is a crime to maintain. No private right has been invaded—no private wrong is to be redressed. The sole and only purpose is the establishment of the fact that a crime—a public wrong—has been committed; that the defendants or appellants have been guilty, and the abatement of the means by which the offense against the public has been committed and continued. Is an injunction suit commenced and prosecuted in chancery the due process of law the constitution of Iowa has provided for ascertaining guilt and punishing offenses against the law? Is the conscience of the chancellor the only refuge a party accused of crime has to which he may flee and be sure of a true deliverance from the charge of guilt?

In every other class of offenses in Iowa, an accused person has a vested right in the ancient forms and processes by which guilt or innocence is established. In this he is tried in chancery, and in the first instance his guilt is established by ex-parte affidavits filed with the chancellor. The penalties denounced against him for maintaining this kind of nuisance are far greater and far more onerous than are prescribed in case of any other kind of nuisance of which the law takes cognisance. See sections 4089, 4090, 4092 and 4093 of the Code of Iowa of 1873.

I cannot do better in this connection than quote from the opinion of Judge Field in the *County of Santa Clara* vs. *Southern Pacific Railroad Co.*, changing only a few words: "The Fifth amendment to the constitution declares that no person shall "be deprived of life, liberty or property without due process of law." This is a limitation upon the federal government similar to that which exists in the constitution of several of the states against their own legislative bodies. * *

"Now the Fourteenth amendment extends in this respect the same prohibition to the states that the Fifth amendment did to the federal government. 'Nor shall any state deprive any person of life, liberty or property without due process of

law," and it adds to the inhibition "nor deny to any person within its jurisdiction the equal protection of the laws.' * * * Surely these great constitutional provisions, which have been not inaptly termed a new *Magna Charta*, cannot be make to read as counsel contend : 'Nor shall any state deprive any person of life, liberty or property without due process of law, *unless he is engaged in the manufacture of lager beer*, nor deny to any person within its jurisdiction the equal protection of the laws, *unless he sells upon the premises where manufactured such lager beer.*"

"How petty and narrow would provisions thus limited appear in the fundamental law of a great people. The constitutional guarantees of due process of law and of equality before the law, would be dwarfed into comparative insignificance and almost emasculated of their protective force if thus restricted in their meaning and operation."

Upon this record as made, and upon the motions filed, the only question to be determined is, does a federal question arise. Is there sufficient stated in the amended petition for removal to give to the federal court jurisdiction of the controversy? However this case may be finally decided upon its merits, this court will not at this time inquire. If there is a state of facts which calls for a determination as to whether the laws of which we complain are in derogation of the rights claimed to belong to these appellants under either clause of the Fourteenth amendment of the constitution of the United States then the present motions must be overruled. If any doubt exists, that doubt ought to be solved in favor of the jurisdiction. We submit as proper subject for consideration that questions of as grave import as the ones contained in these records ought not to be decided upon mere preliminary motions, motions that are sprung in a hurry and require to be argued and considered in such brief space of time. It is no exaggeration to say that besides the ninety-five to one hundred suits directly dependent upon these, there is not a judicial district in Iowa, that does not contain numerous citizens whose rights are more or less dependent upon the result of these cases. Over $4,000,000 of property in Iowa will be affected by the decision to be made in these cases, and we submit that

while considerations of this character cannot control the action of the court in its declaration of the law governing them they ought to have some weight in determining that rights so dear and decisions so far reaching in their effects should not be made upon mere preliminary motions of the character now before the court.

One other consideration it is hoped will be received. In the decision of nearly all of the questions arising under this Fourteenth amendment, the court itself has almost always been divided. Commencing with the slaughter house cases, the opinion was delivered by five of the judges, the other four dissenting, and time in its mutations has left but one judge (our highly esteemed friend, that eminent jurist, Mr. Justice Miller,) who united in that opinion. In *Tennessee* vs. *Davis*, *Strauder* vs. *West Virginia*, *Virginia* vs *Rives*, Ex-parte Virginia, all reported in the 100 U. S. besides a number of others that might be cited, there has not been unanimity in the opinions pronounced. So that it cannot be claimed as matter of fact, that upon the proper construction of the Fourteenth amendment as applied to all the cases that have, or that are likely to arise, there is a fixed and unerring rule of decision. Indeed it has been announced from the bench of this august tribunal, that no fixed rule could be laid down, but that it is better "to leave the meaning to be evolved by the gradual process of inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

The question upon the facts now presented has never been passed upon by this court, and it is submitted that it should not be decided upon a mere preliminary motion.

The foregoing was written and printed when it was not known that a continuance would be granted by this court. We beg leave to submit some additional considerations:

When does a Federal question arise, such as gives the judicial tribunals of the United States jurisdiction of controversies which they would not otherwise have a right to determine? If we understand the course of decision, it is to the effect that

it does not depend upon the validity of the claim set up under the constitution or laws. "It is enough if the claim involves a real and substantial dispute or controversy in the suit."

In *Cohens* vs. *Virginia*, 6 Wheaton 264, this court say: "A case in law or equity, consists of the right of one party as well as the other, and may truly be said to arise under the constitution or law of the United States, whenever its correct decision depends on the construction of either."

See also to the same effect, *Tennessee* vs. *Davis*, 100 U. S. 264.

In *Ames* vs. *Kansas*, 111 U. S. 462. This court, regarding the jurisdiction under this class of claim, say: "The right set up by the company and by the directors as well, will be defeated by one construction of these acts, and sustained by the opposite construction. When this is so it has never been doubted that a case is presented which arises under the laws of the United States."

In *Starin* vs. *New York*, 115 U. S. 257, is found the following language in the opinion of the court: "The character of a case is determined by the questions involved. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875, otherwise, not."

This same language was again used with approval by this court in *Southern Pacific Railroad Company* vs. *State of California*, Vol. 6, page 993, Supreme Court Reporter.

It was in the beginning of controversy upon the scope and extent of the 14th Amendment intimated that it was probable it would never be held to apply to any but those for whose benefit it was originally proposed and adopted, the emancipated race. But as discussion has been added to discussion, and the language of the provision has been studied and the needs of the people have been ascertained, a wider scope and

effect has been given, and in the case of *Yick Wo* vs. *Hopkins*, Vol. 6, No. 25, p. 1064, of Supreme Court Reporter, recently decided in this court, the numerous friendless Chinese in this country have been brought within the protection of the Federal against the usurpations of the State governments.

Surely this advance will not meet with any set back. This conclusion will not be restricted but on the contrary extended, until we shall realize what Mr. Edmunds so eloquently expressed in an argument before this court, when in speaking of the care and anxious solicitude which marked the enactment of the amendment he said: "There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand, that was not considered. And the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure,—secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power of the whole body of the States and the whole body of the people."

In *County of Santa Clara* vs. *Northern Pacific R. R. Co.*, 18th Federal Reporter, p. 398, Mr. Justice Field, declares: "With the adoption of the amendment the power of the States to oppress any one, under any pretense or in any form, was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws; and by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property and to the pursuit of happiness. * * * [This protection] is the shield which the arm of our blessed government holds at all times over everyone, man, woman and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State,—such is the sovereign command of the

whole people of the United States,—no state shall touch the life, the liberty, or the property of any person however humble his lot or exalted his station, without due process of law; and no state, *even with due process of law*, shall deny to any one within its jurisdiction the equal protection of the laws."

The police power of a State cannot be said to be above this amendment and its authority, when it is remembered, that it was against the exercise of this very police power by the State, existing and threatened against the colored race, that this authority of the general government was intended to be invoked.

In this (the 8th) circuit since the decision of *State* vs. *Walruff* already referred to, the courts have in several instances refused to remand cases of this character. Notably *Kessinger* vs. *Heickhouse*, Vol. 27, Federal Reporter 883, and *Mahin* vs. *Pfeiffer*, Ibid 892.

The judge in the first case says, page 885: "It was lawful to sell wine, ale and beer in Iowa prior to the act of 1884. It was lawful to fit up and prepare property for that purpose, to purchase furniture, and to invest money in ale, wine and beer for sale. A person investing money in these things had a clear vested right of property in them and a right to use them for the purpose for which they were designed, that purpose being lawful. * * * Rights and equities do not depend upon the amount involved in a decision, and the deprivation of a small sum may be more grievous to a person of small means than the loss of a great amount to a person of ample wealth."

And this language is used and properly with reference to a mere saloon, for which the proprietor is obliged to purchase the commodity he sells. The reasons for holding these enactments utterly void are much stronger, if any such thing can well be, when the result will be to destroy the right to sell that which the party himself manufactures. We request special attention to the reasoning of the learned judge in these cases.

That it was the intention of the legislature to make as onerous as possible the burdens of the people under this law, amendments were added by the 21st General Assembly, whereby mere gossip is made competent evidence to establish

the fact of maintaining a nuisance; the license issued by the government of the United States is made *prima facie* evidence of guilt, and in case of conviction, *before the chancellor*, the judge is bound to tax in each cause for the benefit of the plaintiff against the defendant, an attorneys' fee of not less than $25 as part of the costs. In no other case in Iowa are attorneys' fees allowed against a defendant. In Dubuque County alone, there are now pending over 200 of these cases, and at the minimum of $25 each, $5,000 as costs will be taxed against the defendants for attorneys' fees alone, in addition to all other costs, and in addition to the utter destruction of their property.

We venture the assertion that never since the formation of the government has such high-handed legislation to affect a class of persons, been enacted as that against which we are now protesting.

II.

The next question to be considered is: Were these cases properly removable under Sec. 641 of the Revised Statutes?

We think upon this proposition the answer must be in the affirmative.

The facts of the petitions for removal which for the purposes of the case, must be taken as true, show that these petitioners, by the enactments complained of, are denied and deprived of certain rights as citizens and inhabitants of the United States, residing in Iowa, that they can only maintain in a court of justice. The enactments already referred to, and the decisions of the highest court within the state, demonstrate that they cannot enforce in the state courts, the rights they possess, nor prevent in the state tribunals, the wrongs threatened. What then are they to do, and where are they to go? It seems to us that Sec. 641, points out their remedy. It is true these petitioners are not American citizens of African descent, but if the case of *Yick Wo* vs. *Hopkins*, means anything they do not have to be; but they may now claim the benefit of the 14th Amendment and the laws made in pursuance of it.

We think that, since the decision last referred to, this case falls squarely within the requirements laid down in the case of *Strauder* vs. *West Virginia*, 100 U. S. 310.

If the enactments complained of are in derogation of the rights of appellants, the court of last resort in Iowa has declared them of binding force, and the inferior courts of the state, in which these cases originated are bound to follow the decision of their superior tribunal.

No one can successfully claim but that these appellants are denied and cannot enforce in the judicial tribunals of the state, the rights secured to them under the fourteenth amendment and the laws in pursuance thereof; and this fact is plain and notorious before the commencement of the trial, because the state by its legislative and especially by its judicial functionaries has in effect so declared.

In *Virginia* vs. *Rives* 100 U. S. 321, this court says: When a statute of a state denies his right or interposes a law to his enforcing it in the judicial tribunal, the presumption is fair, that they will be controlled by it in their decisions, and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within Sec. 641.

When, of course, such presumption gives way to certainty, as in the Supreme Court of Iowa, the case is made beyond a peradventure.

See also *Tennessee* vs. *Davis* 100 U. S. 264, already referred to.

The case, No. 1288, (*O'Malley* vs. *Farley*), upon this docket involves the same questions as the present one in effect. They are unlike in this respect: In the present case, the defendants manufacture the beer they sell. In No. 1288 the defendant buys what he vends. He has, however, as the facts show, been engaged in the business and made the investments he did, long before the law was enacted and comes within the cases decided by Judge Love in this circuit, referred to above, and we respectfully request that this argument may be taken as applying to both cases.

We submit that both upon the facts alleged in the petitions for removal, and the law applicable to these cases, that they ought not upon the appeals taken be dismissed. That they involve questions of Federal cognizance, which give them a standing in the only court (the United States) where they have not been prejudged, we confidently believe.

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